IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GINNY HENSHAW and COLLEEN REED,

Plaintiffs,

v.

THE HARTFORD INSURANCE, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY and DOES 1 through 20, inclusive,

Defendants.

CIV-S-04-0022 DFL-KJM

MEMORANDUM OF OPINION AND ORDER

Plaintiffs Ginny Henshaw ("Henshaw") and Colleen Reed ("Reed") bring this lawsuit against their former employer, defendants Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford"), alleging that they suffered adverse employment actions based on their age and gender. Plaintiffs allege that there was a pattern and practice within Hartford's Northern California regional office to push out older employees and replace them with younger employees. Hartford moves for summary judgment against both plaintiffs. For the reasons discussed below, the court GRANTS Hartford's motion.

I.

Both Henshaw and Reed were employed in Hartford's Northern California Region, working in the fields of sales and marketing. (Opp'n at 3-4.) Kevin Harnetiaux ("Harnetiaux") was the regional vice president ("RVP") of the Northen California Region during the relevant time period. (Telfer Second Decl. Ex. 4.) Harnetiaux oversaw about 40 employees in the sales and underwriting areas, broken down into smaller employment departments. (Reed SUF ¶ 57.)

The Northern California Region is part of Hartford's Western Division. (Telfer Decl. Ex. 126.) Mark Dobrzenski ("Dobrzenski"), a Senior Vice President ("SVP"), has been the head of the Western Division since 2001. (Telfer Decl. Ex. 126.) The Western Division is divided into four regional offices: (1) Denver; (2) Northern California; (3) Southern California; and (4) Southwest. (Reed SUF ¶ 55.) These regions are comprised of different offices in various locations; for example, the Northern California Region has both a Sacramento and a San Francisco office. Because the bases for Henshaw's and Reed's claims differ significantly, the court discusses each of their claims and circumstances separately.

A. Ginny Henshaw

Henshaw was employed as a select customer sales representative ("SCSR") in the Sacramento office of Hartford's Northern California Region. (Defs.' SUF ¶ 1.) Henshaw, who was 48 during the relevant time period, had worked for Hartford since

1976. (Henshaw SUF ¶ 89.)

Henshaw's performance evaluations for the years 2000 and 2001 reveal a mixed performance record. Her year 2000 evaluation, given to her by then-RVP Rich Ulrey ("Ulrey"), rated her commendable or excellent in almost every category. (Henshaw Decl. Ex. 1.) However, she also received a rating of "does not meet expectations" in the area of underwriting skills. (Id.) Similarly, while she received uniform ratings of commendable on her 2001 evaluation, given to her by her then-supervisor Ms. Jan Woods ("Woods"), Woods also noted that Henshaw's financial objectives were too low. (Id. Ex. 2.) Finally, on Henshaw's evaluation for the final quarter of 2001, Woods rated Henshaw an "unsatisfactory performer" in the categories of technical skills and sales/sales management.[1] (Defs.' SUF ¶ 2; Loughran Decl. Ex. E.)

In March 2002, Mr. Chris Loughran ("Loughran") replaced Woods as Henshaw's direct supervisor. (Henshaw SUF ¶ 95.) At around the same time, Harnetiaux replaced Ulrey as the RVP of the Northern California Region. (Id. ¶ 93.) Loughran gave Henshaw another set of mixed reviews on her next performance evaluation. While she primarily received ratings of "commendable," Loughran also told Henshaw she needed to work on several areas of job development, including: (1) visiting the Select Customer Insurance Center before the end of 2002 to improve her

[1] Although this evaluation was written by Jan Woods, Henshaw's new supervisor, Chris Loughran, delivered it. (Ruggles Decl. Ex. O at 96-97.)

relationships and get updated on center operations; (2) using a sales journal to uncover new sales opportunities; and (3) completing an average of 10-12 sales calls per week. (Loughran Decl. Ex. F.)

Despite her mixed performance evaluations, other evidence suggests that Henshaw was performing her job adequately through at least the first part of 2002. For instance, Henshaw was nominated by several coworkers for two office awards for good teamwork. (Henshaw Decl. Ex. 3.) Additionally, a nationwide Hartford SCSR Performance Monitoring Report listed Henshaw among the top third of Hartford SCSRs. (Id. Exs. 103, 104.) Finally, a Northern California SCSR monitoring report showed that, through May 2003, Henshaw was meeting her new and total business growth objectives. (Id. Ex. 52.)

However, Henshaw's performance evaluations worsened throughout 2002 and 2003. On February 28, 2003, Loughran gave Henshaw her final 2002 written performance evaluation. (Mot. at 6.) Although Henshaw received commendable ratings in most categories, she received an "unsatisfactory performance" rating in the customer satisfaction category. (Defs.' SUF ¶ 5.) Additionally, in the comments section of the evaluation, Loughran told Henshaw that she continued to need improvement in the areas listed on her last evaluation. (Id.; Loughran Decl. Ex. G.)

Henshaw received another critical evaluation from Loughran on March 20, 2003. (Loughran Decl. Ex. H.) As part of this evaluation, Loughran addressed the following problems with

Henshaw's performance: (1) shortfalls in booking new business with her "priority agents"; (2) setting her objectives for business development within her territory too low; (3) communication problems with the various agents in her region; (4) failing to follow certain sales and agency practices, such as making 10-12 calls per week and keeping a sales journal; and (5) a lack of depth in Henshaw's producer evaluation documents. (Id.) Loughran concluded his evaluation by stating, "Ginny, together the five areas addressed above are the core job responsibilities of the SCSR position. There is a need for immediate improvement in all areas." (Id.)

On April 7, 2003, Loughran issued Henshaw a sixty-day Written Warning Performance Improvement Plan (an "action plan") for her alleged failure to improve her job performance in the five areas identified by the March 20, 2003 evaluation. (Defs.' SUF ¶ 7; Loughran Decl. Ex. I.) Loughran asserts that it was his decision to put Henshaw on an action plan, and that he asked Harnetiaux only for assistance and guidance as to the proper procedure for doing so. (Ruggles Supplemental Decl. Ex. DD at 140-41.) Following the issuance of the action plan, Henshaw's relationship with Loughran continued to deteriorate. Henshaw began avoiding contact with Loughran and stopped responding to his messages. (Henshaw Decl. Ex. 7.)

Two months later, on May 27, 2003, Loughran informed Henshaw that she had not met the terms of the April 7, 2003 action plan and issued her a final, sixty-day written warning. (Defs.' SUF ¶

9.) As part of the final written warning, and in keeping with Hartford's personnel policies, Henshaw was presented with a "special separation package." (Id. ¶ 10.) The separation package offered Henshaw a severance package in exchange for her resignation and release of all claims against Hartford. (Id.)

Henshaw rejected the offered separation package. (Defs.' SUF ¶ 15.) She was fired at the end of the sixty-day final warning period. (Id.) Loughran states that it was his decision to terminate Henshaw, although Mel Johnson ("Johnson"), a human resources employee, was the one who called and informed Henshaw of her termination. (Defs.' Resp. to Henshaw SUF ¶ 98.) Henshaw's sales territory was eventually reassigned to Jan Woods. (Id.) Woods was 52 at the time. (Id. ¶ 16.)

While this conflict between Henshaw and Loughran was escalating, Henshaw made two complaints to Victor Perez, the assistant vice president for human resources at Hartford. (Henshaw SUF ¶ 126.) On April 8, 2003, Henshaw complained that she was harassed on November 17, 2002 by an agent who teased her about ordering rice and beans during a business dinner. (Defs.' SUF ¶ 34.) Henshaw submitted a second complaint to Perez on April 30, 2003, regarding Loughran's decision to put her on an action plan. (Henshaw Decl. Ex. 7.) In the letter to Perez, Henshaw asserted that the actions taken against her were part of a larger pattern of age and gender discrimination in the Northern California Region. (Id.) Perez looked into the allegations raised by Henshaw's April 30,2003 complaint. (Ruggles Decl. Ex.

R.) On June 2, 2003, Perez issued a memo concluding that Henshaw's claims were unsubstantiated. (Id.)

B. Colleen Reed

Reed was employed by Hartford as a marketing specialist in the Sacramento office in the Northern California Region. (Defs.' SUF ¶ 40.) Reed, who was 53 during the relevant time period, had worked for Hartford since 1983. (Reed SUF ¶¶ 52, 60.) She consistently received positive evaluations, honors, and other recognition for her work. (Id. ¶ 54.) On October 10, 2002, Reed was notified that her position was being eliminated on a company-wide basis. (Defs.' SUF ¶ 41.) Hartford informed Reed that if she was unable to find an alternate open position within the company within sixty days, her employment would end effective December 9, 2002. (Id. ¶ 42.)

During this sixty-day period, Reed attempted to find an open position within Hartford. (Reed Decl. ¶ 7.) Reed filled out a Job Interest Questionnaire with Hartford's human resources department, asking to be considered for any vacant positions within the Sacramento office. (Id. Ex. 7.) Additionally, she expressed interest in an SCSR position that she heard might become available in Hartford's Las Vegas office. (Id.) Several of her superiors, including Harnetiaux, offered to help her in any way they could. (Id. ¶ 9.)

Despite her efforts, Reed was unable to find an open position in the Sacramento office within the sixty-day period and the Las Vegas position had not yet been posted. There was an

opening for an SCSR position in the Northern California Region posted during this period, but the position was based in the San Francisco Bay area. (Id. Ex.8; Telfer Decl. Ex. T at 146.) Loughran and Harnetiaux hired Tamara Zars (age 26) to fill that position. (Telfer Decl. Ex. H at 87.) Reed did not apply for, nor was she considered for, this position. (Defs.' Resp. to Reed SUF ¶ 62.) Therefore, when the sixty-day period expired, she had not formally applied for any position at Hartford. (Mot. at 8.) Accordingly, her employment terminated on December 9, 2002. (Defs.' SUF ¶ 43.) Reed left Hartford and began working for another insurance company soon thereafter. (Id. ¶ 45.)

Although she had already begun working for another company, Reed continued to pursue the potential SCSR opening in Hartford's Las Vegas office. (Henshaw Decl. ¶ 11.) She formally applied for the position on January 14, 2003 when the position was officially posted on-line. (Defs.' SUF ¶ 45.) The Las Vegas office is part of the Denver Region within Hartford's Western Division. (Id. ¶ 46.) Rex Sprunger ("Sprunger") was the RVP of the Denver Region in 2003. (Id.)

Reed was neither interviewed nor selected for the Las Vegas position. (Reed SUF ¶ 63.) Another applicant, Michael Sharr ("Sharr") (age 32), was hired in March 2003. (Defs.' SUF ¶ 47.) Darren Lewis ("Lewis"), the SCSR manager for the Denver Region, Mel Johnson, a human resources employee who works with both the Northern California and Denver Regions, and Sprunger all participated in the hiring decision. (Reed SUF ¶ 63.) However,

according to Sprunger and Lewis, Lewis was the principal decisionmaker since he was the manager of the SCSRs in the Denver Region. (Defs.' Resp. to Reed SUF ¶ 55.)

C. Other Alleged Discrimination in the Northern California Office

Plaintiffs assert that their experiences were part of a pattern and practice of age and gender discrimination in the Northern California Region. They contend there was a concealed effort to push out the older females in the Northern California Region and replace them with younger employees. Below is a summary of plaintiffs' "pattern and practice" theory.

At the center of the scheme is Dobrzenski (age 48), the SVP of Hartford's Western Division. (Henshaw SUF ¶¶ 92-96.) Upon becoming SVP in 2001, Dobrzenski "put in place" several individuals he had worked with earlier in his career at Hartford. First, he participated in the decision to terminate Ulrey (male, age 54), the RVP of the Northern California region, and replace him with Harnetiaux (age 40) in March 2002. (Id. ¶ 93.) Ulrey was given an action plan and decided to accept a severance package and leave the company. (Id.)

Around the same time, while Ulrey was on an action plan himself but had not yet been replaced, Woods (female, age 51), the former select customer sales manager in the Northern California Region, was given an action plan by Ulrey and eventually agreed to take a demotion to an SCSR position. (Id. ¶ 95.) She was replaced by Loughran (male, age 37). (Id.) Similarly, Carolyn Unger ("Unger") (female, age 54), the former

middle market manager, was given an action plan by Ulrey and agreed to accept a demotion to an underwriter position. (Id. ¶¶ 112, 114.) She was replaced by Melinda Thompson ("Thompson") (female, age 26). (Id.) Dobrzenski had worked with both Harnetiaux and Loughran at earlier periods in his career, and he participated in the decision to hire Loughran and Harnetiaux and to terminate Ulrey. (Id. ¶¶ 93, 95.) However, there is no evidence showing that Dobrzenski participated in the decision to give action plans to either Unger or Woods.[2]

Plaintiffs argue that, beginning with Harnetiaux's appointment to the RVP position, a pattern emerged in which older employees in the Northern California Region were given unexpected action plans, forced to accept a demotion or resign, and replaced by younger individuals. (Opp'n at 6-8.) Plaintiffs identify six examples of this pattern between the years 2002 and 2003 (including Henshaw). (Id.; Reed SUF ¶¶ 71-83.) Additionally, plaintiffs point to a seventh employee, Lynda Rawlings (female, age 53) who, while not given an action plan, has allegedly been denied any bonuses since Harnetiaux became RVP in 2002. (Opp'n at 6-8.)

Harnetiaux was the direct supervisor for only one of these identified individuals. However, as RVP, Harnetiaux admits to being at least somewhat involved in the decision to place all of them on action plans. (Telfer Decl. Ex. E. at 138.) There is no

[2] At the hearing on this matter, plaintiffs argued that Dobrzenski was controlling Ulrey and forcing him to demote Woods and Unger. However, there is no evidence to support this theory.

evidence showing that Dobrzenski was involved in the decision to issue any of these action plans. Thus, in all, plaintiffs allege that, within a two-year period, out of an office of about 40, seven employees over the age of forty (and ten counting Ulrey, Unger, and Woods, who were given action plans just prior to Harnetiaux arriving), experienced some form of adverse employment action.

While these older individuals were being "forced out," seven individuals under the age of forty were hired to fill new or otherwise vacant positions within the Northern California Region. (Henshaw SUF ¶¶ 116, 117.) As a result of these actions, plaintiffs assert that, by the end of 2003, most of the female employees over the age of forty in the Northern California Region underwriting/sales office were forced out and replaced with employees under the age of forty. (Id. ¶ 122.)

Loughran, who was the one who gave Henshaw her action plan, was not the direct supervisor of any of these other identified employees. (Mot at 12.) Besides Henshaw, Loughran has only terminated one other SCSR, Dawnya Katz, a thirty-year old employee. (Defs.' SUF ¶ 24.) Loughran currently supervises seven SCSRs, six of whom are female. (Id. ¶ 25.) He hired five SCSRs between 2001 and 2005, only one of whom is male. (Id. ¶ 26.) None of these new hires are over the age of forty. (Pls.' Opp'n to Defs.' SUF ¶ 26.)

D. Procedural History

Henshaw and Reed bring this state-law discrimination suit,

asserting claims for (1) age discrimination in violation of the California Fair Employment and Housing Act ("FEHA"); (2) gender discrimination in violation of FEHA; (3) wrongful termination in violation of public policy; and (4) breach of the implied covenant of good faith and fair dealing. Henshaw also brings a claim for retaliation in violation of FEHA. Hartford removed the case to federal court and now moves for summary judgment on all claims.

II.

A. Henshaw's Claims

1. Age Discrimination FEHA Claim

Henshaw has not presented any direct evidence of age discrimination. Accordingly, to prevail, she must satisfy the McDonnell-Douglas three-step burden shifting scheme for discrimination claims based on disparate treatment. Guz v. Bechtel Nat., Inc., 24 Cal.4th 317, 354, 100 Cal.Rptr.2d 352 (2000). Under this burden-shifting scheme,

> [a] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996) (emphasis in original) (quoting Wallis v. J.R. Simplot Co.,

26 F.3d 885, 889 (9th Cir. 1994)).[3] Although Henshaw has established a prima facie case of discrimination, she is unable to overcome the legitimate, nondiscriminatory reason Hartford has put forward.

a. Prima Facie Case

To show a prima facie case of age discrimination, a plaintiff must offer "circumstantial evidence such that a reasonable inference of age discrimination arises." Hersant v. Dep't of Soc. Servs., 57 Cal.App.4th 997, 1002, 67 Cal.Rptr.2d 483 (1997). "The requirement is not an onerous one." Id. at 1002-03. A plaintiff must show that "(1) [s]he was a member of a protected class, (2) [s]he was qualified for the position [s]he sought or was performing competently in the position [s]he held, (3) [s]he suffered an adverse employment action . . ., and (4) some other circumstance suggests discriminatory motive." Guz, 24 Cal.4th at 355.

Hartford contends that Henshaw fails to establish a prima facie case of discriminatory discharge for two reasons, neither of which are persuasive. First, it asserts that Henshaw cannot meet the second part of the prima facie test because she was not performing her job satisfactorily at the time of her discharge, as demonstrated by her numerous sub-standard reviews. (Mot. at 9.) However, Henshaw has submitted objective documentation

[3] "Because California law under the FEHA mirrors federal law under Title VII, federal cases are instructive." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1219 (9th Cir. 1998).

suggesting that, at least through May 2003, she was meeting her new and total business objectives. She also has shown that, in 2002, she received several company awards for good teamwork and that she ranked in the top third of Hartford's SCSRs nationwide on Hartford's SCSR Performance Monitoring Report. This evidence is sufficient to satisfy her minimal burden at the prima facie stage.

Second, Hartford contends that Henshaw fails to establish a prima facie case because she was not replaced by a younger employee. (Id.) However, replacement by a younger employee is not necessarily required to establish a prima facie case of discriminatory firing; rather, it is only one way of suggesting a discriminatory motive. Begnal v. Canfield & Assocs., Inc., 78 Cal.App.4th 66, 74-77, 92 Cal.Rptr.2d 611 (2000); Heard v. Lockheed Missiles & Space Co., Inc., 44 Cal.App.4th 1735, 1755, 52 Cal.Rptr.2d 620 (1996). For instance, "if the replacement is a transferred existing employee instead of a new hire, and there is evidence that all or most new hires are substantially younger, the jury could conclude the employer nevertheless reduced the overall age of its workforce by terminating some employees based upon age." Begnal, 78 Cal.App.4th at 76.

This is what Henshaw asserts occurred in this case. Although Henshaw's territory was taken over by an older employee, Jan Woods, Woods was a transferred existing employee. Furthermore, Henshaw provides evidence suggesting that several other older employees were forced to either accept a demotion or

resign and that a large majority of the new hires were under the age of 40. The combination of this evidence is sufficient to satisfy her prima facie showing.

b. Evidence of Pretext or Discriminatory Intent

Hartford has offered a nondiscriminatory reason for Henshaw's termination. It claims she was fired for poor job performance. (Mot. at 9.) Accordingly, to avoid summary judgment at this stage of the burden-shifting scheme, the employee must "show that the articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002); see also, Hersant, 57 Cal.App.4th at 1004-05 ("[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason was untrue or pretextual or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination."). If the employee is relying solely upon indirect or circumstantial evidence of pretext, then the evidence must be "specific" and "substantial" to survive summary judgment. Villiarimo, 281 F.3d at 1062 (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998)).

Henshaw attacks Hartford's articulated, nondiscriminatory

reason on several grounds, none of which are sufficient to avoid summary judgment. First, Henshaw challenges the veracity of the poor evaluations she received from Loughran. (Opp'n at 5.) Good employees, she asserts, do not suddenly become bad employees after 21 years. (Id.) However, Henshaw had been receiving mixed evaluations from her previous supervisors, including Woods and Ulrey, who were both in their fifties, before Loughran and Harnetiaux arrived. This undercuts her claim that she was framed by Loughran and Harnetiaux.

Furthermore, Henshaw's complaints about Loughran's critiques sound more like explanations for her performance than assertions that the stated reasons are false. For instance, Loughran complained that Henshaw had serious shortfalls in obtaining new business from her top priority agents. (Loughran Decl. Ex. I.) Henshaw does not dispute this fact, but rather argues that Loughran's expectations for her were unrealistic. (Henshaw Decl. Ex. 7.) She goes on to blame her performance on the failure of upper management to give her the support she needed to succeed. (Id.) Likewise, in response to Loughran's criticism of her handling of agency negotiations with one of her largest agents, CPAX, Henshaw recognizes the problems with CPAX but blames them on the failure of Hartford's upper management to make certain decisions. (Id.) Finally, she admits to not responding to certain communications from Loughran, but states that she was unable to do so because of the stress that Loughran caused her. (Id.)

Henshaw does dispute the veracity of a few of Loughran's criticisms. For instance, she denies Loughran's assertion that she had not been keeping pace with her sales journals. (Id.) She also claims she had a sales plan in place. (Id.) Finally, she disputes that her producer control plans for certain agents were insufficiently comprehensive. (Id.) However, these disputed issues are only a relatively small portion of Loughran's list of critiques. Furthermore, Henshaw has not produced objective documentation, besides her own statements, supporting her assertions. An employee's subjective personal judgments of her own competence do not raise a genuine issue of material fact. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996).

The 2002 and 2003 SCSR performance monitoring reports Henshaw identifies also do not sufficiently contradict the veracity of Hartford's nondiscriminatory reason. Hartford contends that Henshaw's numbers on these reports are skewed and inflated because Henshaw had not been diversifying her business as she had been asked to do. (Reply at 5-6.) Henshaw had been specifically criticized for this on several of her poor performance evaluations. (Id.) More importantly, these numbers do not address directly many of the specific criticisms Loughran articulated on her performance evaluations.

In short, Henshaw's evidence does not sufficiently call into question Hartford's articulated, nondiscriminatory reason for firing her. "It is not enough for the employee simply to raise

triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound." Hersant, 57 Cal.App.4th at 1005. Rather, "the employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons." Id. (internal quotations omitted). Henshaw's evidence fails to accomplish this.

Second, Henshaw argues that Loughran's criticisms were pretextual because Henshaw was outperforming younger co-workers who were not given action plans. (Opp'n at 5.) Specifically, Henshaw states that she was ranked higher than three SCSRs in her office - - Kathleen Temple, Woods, and Tamara Zars ("Zars") - - on Hartford's nationwide 2002 Select Customer Performance Monitoring Report and the Northern California SCSR Monitoring Report. (Henshaw SUF ¶ 106.) However, neither Temple, Woods, or Zars were placed on action plans. (Opp'n at 5.)

This argument is also unpersuasive. As described above, Hartford has questioned the relevance of these monitoring reports. Moreover, Zars is a poor comparison because she did not have a sales territory at the time of the rankings. (Opp'n at 5-6.) Most importantly, even if Henshaw was outperforming these other three SCSRs, this does not suggest that Loughran's true motivation was age discrimination. In fact, it suggests just the

opposite, given that Woods (age 51) is over forty as well.[4] (Id. ¶ 51.)

Third, Henshaw rests her case heavily upon the alleged pattern and practice of age discrimination within the sales/underwriting section of the Northern California Region. However, this theory is problematic for several reasons. For one, she has provided no statistical evidence to support it. For instance, she provides no documentation showing, at the end of 2003, whether the average age of the employees of the Northern California Region had lowered or how many individuals over forty remained. She also provides no documentation showing whether this pattern is statistically significant, whether it differs from numbers from earlier years, how many other individuals under the age of forty received action plans, or what the turnover rate is for these positions. Without such statistics, the court finds it difficult to gauge the significance of plaintiffs' evidence.[5]

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[4] Plaintiff also argues that one can draw an inference of age discrimination based upon the "severance package" she was offered as part of her action plan. See Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1342 (9th Cir. 1987) (holding that contemporaneous offer of severance pay package in exchange for release of all potential claims is admissible to show discrimination). Here, however, the offered severance package was made according to Hartford's stated personnel policies. It was not a special action taken specifically with regard to Henshaw's case. Therefore, the offer of a severance package does not suggest a discriminatory motive.

[5] At the hearing on this motion, plaintiff's counsel argued that a ruling by the magistrate judge prevented plaintiffs from collecting such information. Plaintiffs had sought discovery of other examples of this alleged "pattern and practice" throughout Hartford's Western Division. In response to a request for a protective order from Hartford, the magistrate judge limited discovery to documents pertaining to the Northern California

Additionally, none of these individuals had Loughran as a supervisor and, accordingly, none of them received their action plans from him. Rather, Loughran has only fired one other SCSR between 2001 and 2005, and that employee was under the age of 40. Henshaw argues this is irrelevant because all the employees she references worked under Harnetiaux and Dobrzenski, and one or both of them were involved with the action plan decisions.[6] (Opp'n at 12.) However, two of the individuals - - Unger and Woods - - received their action plans before Harnetiaux arrived and there is no evidence showing that Dobrzenski was involved in the decision to issue their action plans. Thus, at most there are eight instances (including Henshaw's case) in two years where an employee over the age of forty was given an action plan by Harnetiaux or Dobrzenski, forced out, and replaced with an employee under forty.

Finally, and most importantly, the referencing of these eight cases is insufficient to overcome Hartford's legitimate, nondiscriminatory reason. The Ninth Circuit has held that "[t]o

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Region and the Las Vegas office from December 1, 2001 to the present. (01/06/2005 Order at 1-2.) Plaintiffs contend that this ruling prevented them from providing statistical evidence of the kind described above. However, if plaintiffs felt that they were unable to present sufficient evidence to satisfy their summary judgment burden, it was incumbent on them to make a motion under Fed.R.Civ.P. 56(f) for a continuance to allow for additional discovery on these issues. Plaintiffs have not done so here.

[6] Henshaw also argues that Loughran's firing of Katz is irrelevant because Loughran only fired her after Henshaw had instituted this lawsuit and Katz's firing was "damage control." (Pls.' Resp. to Defs.' SUF ¶ 24.) However, Henshaw has presented no evidence supporting this allegation.

establish a prima facie case based solely on statistics, let alone raise a triable issue of fact regarding pretext, the statistics 'must show a stark pattern of discrimination unexplainable on grounds other than age.'" Coleman v. Quaker Oats Co., 232 F.3d 1271, 1283 (9th Cir. 2000) (quoting Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990)). Statistics that do not take into account variables other than age are unpersuasive. Id.

Accordingly, a plaintiff's statistical evidence must eliminate nondiscriminatory explanations for the disparate treatment by only looking at comparable individuals. Rea v. Martin Marietta Corp., 29 F.3d 1450, 1456 (10th Cir. 1994). Courts have held that for statistical comparisons to be significant, the comparisons must take into consideration whether the other employees have the same job duties, similar performance evaluations, and similar supervisors. Id.; Furr v. Seagate Tech., Inc., 82 F.3d 980, 986-87 (10th Cir. 1996).

Here, the eight identified individuals worked under at least three different supervisors and held various different positions. Further, two of the employees, Jan Schumacher and Bonnie Daniels, had a history of performance problems prior to their separation, and another identified employee, Carolyn Unger, admitted that the issues raised in her action plan "were not fake." (Defs.' Resp. to Reed SUF ¶¶ 75, 81, 82.) Even the type of adverse action these employees suffered is not uniform; one of the identified employees, for example, was denied bonuses as opposed to

receiving an action plan. The only similarities common to all (besides age) are that they all worked in the sales/underwriting section of Hartford's Northern California Region under Harnetiaux and Dobrzenski.[7] Accordingly, Henshaw's attempted comparisons to

[7] The lack of similarity between the eight, identified employees is evidenced by the below chart:

Name	**Position**	**Supervisor**	**Current employment status**	**Other differing features**
Daniels, Bonnie	Senior Underwriter	Anna Martinez	Resigned	Daniels had history of prior performance issues.
Henshaw, Ginny	*SCSR*	*Chris Loughran*	*Fired*	
Miller, William	Middle Market Underwriter	Melinda Thompson	Resigned	
Rader, Diane	Business Technology Solutions Manager	Kevin Harnetiaux	Resigned	
Rawlings, Lynda	Middle Market Underwriter	Leah Locca (current supervisor)/ Melinda Thompson (previous supervisor)	Current employee	Never received an action plan. Rather, she has allegedly been denied bonuses
Schumacher, Jan	Senior Underwriter	Anna Martinez	Resigned	Had received an action plan on an earlier occasion

these other employees is flawed.

Even if these eight other employees are sufficiently comparable, the court cannot say they create a sufficiently "stark pattern unexplainable on grounds other than age" without further statistical evidence. For example, a court has found that a sample of eight employment decisions over a course of two years was too few to be statistically meaningful. See Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1257 (5th Cir. 1977), overruled on other grounds by Burdine v. Tex. Dep't of Cmty. Affairs, 641 F.2d 514 (5th Cir. 1981); Mundy v. Household Fin. Corp., 885 F.2d 542, 546 (9th Cir. 1989) ("In a large corporation with branch offices throughout the country, the discharge of seven older employees over a two and half year period alone does not establish a pattern or practice of discrimination.").

Admittedly, the sample pool that Henshaw focuses on - - an office of forty - - is significantly smaller than the entire corporation.[8] Dobrzenski was the SVP of the Western Division

Ulrey, Richard	Regional Vice President	Mark Dobrzenski	Resigned	
Unger, Carolyn	Executive Underwriter	Melinda Thompson	Resigned	Had received action plan on earlier occasion

(Mot. at 13.)

[8] Dobrzenski was the SVP of the Western Division, which includes three other regions, in addition to the Northern California Region. Yet plaintiff offered no statistics on hiring and termination from the other regions during the relevant time

Nonetheless, in light of the lack of statistical evidence supporting this pattern, the differences in job position, performance history, and direct supervisors among the identified individuals, and Henshaw's failure to seriously challenge Hartford's stated reason for firing her, Henshaw's "pattern and practice" theory is insufficient for a jury to find age discrimination. Accordingly, the court GRANTS Hartford's motion for summary judgment on this claim.

2. Gender Discrimination FEHA Claim

Gender discrimination and age discrimination claims under FEHA are governed by the same legal analysis. Beale v. GTE Cal., 999 F.Supp. 1312, 1320-21 (C.D.Cal. 1996). Henshaw's gender discrimination claim is substantially weaker than her age discrimination claim. Her proffered evidence is insufficient to establish a prima facie case of gender discrimination, let alone overcome Hartford's proffered nondiscriminatory reason.

While Henshaw can satisfy the first three elements of the prima facie case, she has offered insufficient evidence to suggest a discriminatory motive based on gender. Henshaw was replaced by another female. Moreover, the "pattern and practice" she describes is not suggestive of gender discrimination. By Henshaw's own admission, several of the older employees who were forced to resign or accept a demotion - - such as Diane Rader, Carolyn Unger, Bill Miller, and Rich Ulrey - - were replaced by

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period.

younger individuals of the same sex. Also, several of the individuals plaintiffs identify as part of the alleged pattern and practice are men (Miller and Ulrey). Finally, seven of the eight SCSRs Loughran currently supervises are women, and four of the five new SCSRs Loughran has hired are women. In short, Henshaw has presented no evidence suggesting a discriminatory motive based on gender. Accordingly, the court GRANTS Hartford's motion for summary judgment on Henshaw's gender discrimination claim.

3. Wrongful Termination in Violation of Public Policy Claim

Henshaw's claim for wrongful termination in violation of public policy is premised on her claim for age and gender discrimination. For the same reasons the court grants summary judgment on Henshaw's age and gender discrimination claims, it also GRANTS summary judgment on this claim.

4. Retaliation Claim under FEHA

The McDonnell-Douglas burden-shifting test also governs retaliation claims. Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). To establish a prima facie case of retaliation, plaintiff must show that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal link between the protected activity and the adverse employment action. Id. To establish causation, Henshaw must show that "engaging in the protected activity was one of the reasons for [her] firing and that but for such activity [she] would not have been fired." Villiarimo, 281 F.3d at 1064-65.

Henshaw alleges she was terminated in retaliation for the complaint she submitted to Victor Perez in late April 2003. (Henshaw Decl. Ex. 7.) Henshaw's sole basis for alleging a causal connection is the proximity in time between her filing the complaint and her termination (approximately three months). (Opp'n at 14.)

The temporal proximity present in this case is insufficient to establish the causation element. "[T]iming alone will not show causation in all cases; rather, 'in order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee's protected expression.'"[9] Villiarimo, 281 F.3d at 1065 (quoting Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1009-10 (7th Cir. 2000)); Clark County School Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S.Ct. 1508 (2001) (stating that the temporal proximity must be "very close"). Courts have found a three month period between the protected activity and the adverse employment action insufficiently close to support a finding of causation based on proximity of time. Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997); Clark, 532 U.S. at 273-74 (citing Richmond with approval).

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[9] Hartford cites Chen v. County of Orange, 96 Cal.App.4th 926, 948, 116 Cal.Rptr.2d 786 (2002) for the proposition that California courts have moved away from accepting temporal proximity as a sufficient basis for a prima facie claim of retaliation. However, Chen does not explicitly reject the line of cases allowing temporal proximity to establish a prima facie case of retaliation. Furthermore, it has been distinguished by a later California case. Cal. Fair Employment Hous. Comm'n v. Gemini Aluminum Corp., 122 Cal.App.4th 1004, 1020-21, 18 Cal.Rptr.3d 906 (2004).

Here, Henshaw's termination occurred three months after she submitted her complaint to Perez. Therefore, this temporal proximity is insufficient to establish her prima facie case, let alone her burden to overcome Hartford's nondiscriminatory reason for terminating her. Moreover, at the time she submitted her complaint, Loughran had already given her the action plan listing all of the explicit criticisms he had of her job performance. This further weakens Henshaw's temporal proximity argument. Accordingly, the court GRANTS summary judgment on Henshaw's retaliation claim.[10]

5. Breach of Covenant of Good Faith and Fair Dealing

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive *benefits of the agreement actually made*." Guz, 24 Cal.4th at 349 (emphasis in original). Accordingly, the breach of the implied covenant cannot be based upon a claim that the discharge of an at-will employee was made without good cause. Id. at 350.

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[10] Henshaw also makes reference to a formal complaint of harassment she filed in early April 2003 based on allegations that she was ridiculed at a business dinner for ordering beans and rice. (Henshaw Decl. Ex. 5.) However, Henshaw does not appear to rely upon this complaint in her opposition or declaration, focusing instead on the age and gender discrimination complaint she filed in late April 2003. Even if she did attempt to rely on this complaint, she still fails to state a prima facie claim of retaliation. This complaint was filed earlier than the age/gender discrimination complaint, making the temporal proximity argument even weaker. Furthermore, her complaint about ridicule over her food choice does not implicate FEHA and, therefore, cannot be a basis for a FEHA retaliation claim.

Summary judgment is appropriate on this claim because Henshaw was an at-will employee. California Labor Code § 2922 creates a presumption that an employment that has no specified end date is an at-will employment relationship. Furthermore, Hartford's personnel policies expressly provide that all employment is at-will. (Defs.' SUF ¶ 38.)

Henshaw neither disputes these facts nor explicitly asserts that there was an implied-in-fact contract. Rather, she argues that Hartford violated its own articulated policy of zero tolerance of discrimination even after being notified of the illegal conduct by her complaint to Perez. (Opp'n at 14.) This is just another way of arguing that she was fired without cause and for an unlawful purpose. She has provided no evidence showing that this policy created an implied-in-fact contract limiting Hartford's termination rights. Accordingly, summary summery judgment is GRANTED on this claim.

B. Colleen Reed

1. Age Discrimination FEHA Claim

Unlike Henshaw, Reed does not allege that she was wrongfully terminated on the basis of her age. (Defs.' Resp. to Reed's SUF ¶ 54.) Rather, Reed argues that she was wrongfully discriminated against on the basis of age during her search for a new position within Hartford. (Opp'n at 12.) Specifically, she alleges that Hartford wrongfully failed to hire her for the SCSR position in Las Vegas, hiring a less-qualified 30-year old male instead. (Id.) She also asserts that Hartford wrongfully failed to inform

her of, or consider her for, other available jobs in the Northern California Region, such as the new SCSR position filled by 26-year old Tamara Zars. (Id.)

Hartford does not dispute that Reed can establish a prima facie claim of age discrimination. (Mot. at 15.) Rather, it asserts a nondiscriminatory reason for not hiring Reed for the above positions. Hartford contends that Sharr was more qualified than Reed for the Las Vegas position because: (1) he achieved significant agency sales growth and market share while employed with Zurich, another Las Vegas insurance company; (2) he had current business relationships in the Las Vegas region; and (3) he had a college degree. (Id. at 16.) With regard to the San Francisco position filled by Zars, Hartford contends that Reed did not apply for this position and explicitly stated she was only interested Sacramento positions. (Defs.' Resp. to Reed SUF ¶ 62.)

None of Reed's proffered evidence is sufficient to overcome Hartford's nondiscriminatory reasons. First, and most centrally, Reed argues that she was more qualified for the SCSR position than Sharr. (Opp'n at 12.) She asserts she is more qualified because: (1) she has over thirty-six years of experience in the insurance industry; (2) she is familiar with the Las Vegas agents, having lived and worked in Las Vegas in the mid-1980s and late 1990s; (3) she has a deep involvement in the Las Vegas insurance industry, having served as vice president and president elect of Insurance Women of Las Vegas (1999-2000); and (4) she

has worked for Hartford for over 17 years, almost exclusively in the field of sales, marketing, and underwriting. (Reed Decl. ¶ 18; Id. Ex. 12.)

Although Reed makes a plausible argument that she was, in fact, more qualified than Sharr, courts have required more than this kind of showing in order to establish pretext. "The question is not whether the employer properly evaluated the competing applicants, but whether the employer's reason for choosing one candidate over the other was honest." Millbrook v. IBP, Inc., 280 F.3d 1169, 1175 (7th Cir. 2002). Accordingly, while evidence that Reed was more qualified than Sharr is relevant to an argument of pretext, "differences in qualifications between job applicants are generally not probative evidence of discrimination unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 279 (5th Cir. 1999).

Reed's qualifications are not so clearly better than Sharr's that a jury could infer a discriminatory motive. Sharr did have certain qualifications that would make him a more impressive candidate than Reed, namely, his college degree, his current contacts with Las Vegas agents, and his impressive track record in recruiting new business in his last job. Although a college degree was not required for the position, the job position did

state that a bachelor's degree was the "desired education level" for applicants. (Johnson Decl. Ex. A.) Accordingly, Reed's evidence of her qualifications is insufficient to avoid summary judgment.

Regarding the new Northern California SCSR position filled by Zars, Reed does not offer any convincing evidence to refute Hartford's proffered, nondiscriminatory reason. She complains that she was never informed of this position, despite expressing interest in any vacant position in the Northern California Region. (Opp'n at 3-4.) However, the evidence shows that Reed only expressed interest in positions in the Sacramento office, and explicitly did not want a position in the San Francisco area. (Telfer Decl. Ex. T at 146; Reed Decl. Ex. 7.) Accordingly, Reed's age discrimination claim, if valid, must rest on her denial of the Las Vegas position.

As a second basis for finding pretext, Reed asserts that another younger employee was treated more favorably than her. (Opp'n at 12.) She alleges that, unlike her, another Hartford employee, Phaedra Starr (age 25) did not have to compete for a new position when her job was eliminated. (Id.) Starr's position as the business technology sales manager in the Northern California Region was eliminated in 2003, and she was hired by Loughran and Harnetiaux for a vacant SCSR position in the Sacramento office in January 2004. (Reed SUF ¶ 68.) Loughran testified that Starr did not have to apply for the SCSR position. (Telfer Decl. Ex. J at 267.)

It is hard to judge the significance of this comparison based on the limited facts provided by Reed. For instance, the court does not know how many other applicants there were, what their qualifications were, or whether the job was ever posted. Even if Reed had provided more information, the comparison to Starr is of limited value because Reed and Starr were not in comparable positions. Starr's hiring occurred over a year after the elimination of Reed's position and the decisionmakers in Starr's case (Loughran and Harnetiaux) were different than the decisionamakers for the Las Vegas position (Darren Lewis and Sprunger).

Third, Reed argues that Harnetiaux promised to help Reed obtain the Las Vegas position, but never did so. (Opp'n at 12.) This, she claims, suggests a discriminatory motive. (Id.) Even if this allegation is true, Harnetiaux had no involvement in the hiring decision for the Las Vegas position. Accordingly, this alleged fact is irrelevant.

Fourth, Reed points to Hartford's policies of "retention of talent" and hiring from within. (Id. at 4.) She argues that Hartford's failure to hire her, in spite of these policies, suggests a discriminatory motive. (Id.) However, these policies apply only when all other factors are equal. (Telfer Decl. Ex. E at 71-72.) As described above, Reed has not sufficiently refuted Hartford's assertion that Sharr was more qualified than she for the position.

Finally, Reed relies on the same alleged pattern and

practice of discriminatory acts described above. (Id. at 12.) Reed attempts to connect this alleged pattern to the Denver Region by: (1) showing that Dobrzenski hired Sprunger as the RVP of the Denver Region; (2) pointing to one instance where a 54-year old SCSR in the Las Vegas office (Virginia Schultz) was allegedly forced to accept a demotion and was replaced by an individual under 40;[11] and(3) associating Mel Johnson, the human resources employee, who worked with both the Denver and Northern California Regions, with the decision to hire Sharr. (Id. at 3.)

These arguments are unavailing. Even if Reed and Henshaw have shown a pattern and practice of discrimination in the Northern California Region, Reed's evidence suggesting a similar pattern in the Denver Region is nearly nonexistent. Dobrzenski's hiring of Sprunger is not suggestive of discrimination, and the one case of alleged discrimination hardly amounts to a pattern or practice. Furthermore, Reed's reference to Mel Johnson's role in this alleged scheme is unsubstantiated. She presents no evidence beyond mere speculation that Johnson was part of this alleged discriminatory scheme.

For the above reasons, Reed fails to overcome Hartford's nondiscriminatory reason for hiring Sharr. The court therefore GRANTS Hartford's motion for summary judgment on this claim.

2. Gender Discrimination FEHA Claim

Reed has also provided insufficient evidence to avoid

[11] Schultz's position was the one Reed was applying for and that Sharr eventually filled.

summary judgment on her gender discrimination claim. Although Reed has established a prima facie case of gender discrimination, she has not met her burden of proving that Hartford's nondiscriminatory reason is false or that its true motivation was gender discrimination.

As explained above, Reed has not presented evidence showing she was so much more qualified than Sharr as to make Hartford's explanation implausible. Furthermore, as described earlier, the alleged pattern and practice of discrimination does not support an inference of gender discrimination. In fact, two of the younger individuals that Reed complains received better treatment than her as part of her age discrimination claim - - Phaedra Starr and Tamara Zars - - are both women. Accordingly, the court GRANTS Hartford's motion for summary judgment on this claim.

3. Wrongful Termination in Violation of Public Policy

Reed's claim for wrongful termination in violation of public policy is premised on her claim for age and gender discrimination. Accordingly, the court GRANTS summary judgment in favor of Hartford on this claim for the same reasons it grants Hartford's summary judgment motion on Reed's age and gender discrimination claims.

4. Breach of the Covenant of Good Faith and Fair Dealing

Although both Henshaw and Reed assert a claim for breach of the covenant of good faith and fair dealing, the allegations included in plaintiffs' complaint appear more relevant to Henshaw than Reed. For instance, plaintiffs allege that defendants

breached the covenant by "failing to investigate their claims of unfair treatment, to eradicate discrimination and by retaliating against plaintiffs, ultimately resulting in their termination." (Compl. ¶ 41.) However, Reed never complained about any alleged violation and does not dispute that her position was eliminated on a company-wide basis. Therefore, it is unclear what the basis for Reed's claim is. In any event, Reed's claim fails because she, like Henshaw, was an at-will employee.[12] Accordingly, the court GRANTS summary judgment in favor of Hartford on this claim.

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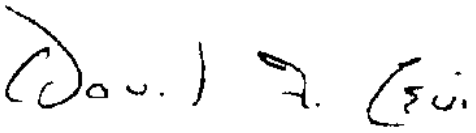
[12] To the extent Reed is arguing that Hartford breached the implied covenant by not taking sufficient steps to insure she found a new position within Hartford, this argument is not supported by the record. The letter Reed received informing her of the elimination of her position merely stated that Reed was eligible to use Hartford's job transition center. (Ruggles Decl. Ex. U.) It did not promise her that she would be rehired in a different position or make her any specific promises about her future. Similarly, any argument that Hartford breached its policy of "retention of employee talent" and favoring hiring from within the company are without merit. These policies only apply when all other factors are equal, and Reed has not shown that she was more qualified than Sharr.

III.

For the above reasons, the court GRANTS Hartford's motion for summary judgment in its entirety. The clerk shall enter judgment.

IT IS SO ORDERED.

Dated: 6/30/2005



DAVID F. LEVI
United States District Judge